LIBRARY
SUPREME COURT. U. S.

Office Supreme Court, U.S.
FILED
MAY 3 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

RECEIVED
MAY 3 1958
OFFICE OF THE CLERK
SUPREME COURT, U. S.

OCTOBER TERM, A.D., 1957.

No. 973

JOHN B. SCHLOSSER,

Petitioner,

vs.

COMMONWEALTH EDISON COMPANY, WILLIS GALE, JOHN W. EVERS, JR., SOLOMON A. SMITH and H. P. SEDWICK,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

HARRY R. BOOTH,
30 North LaSalle Street,
Chicago, Illinois,
Attorney for Petitioner.

Midwest Law Printing Co., - 326 N. Michigan Ave., Chicago.
Telephone: Financial 6-3988

INDEX.

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statutes Involved	3
Statement	4
Reasons for Allowance of Writ	11
I. Petitioner's inability to secure a fair and prompt trial in the Trial Court required the Court of Appeals to take corrective action by mandamus.	11
II. The Court of Appeals sanctioned a departure by the trial court of the proper and usual course of the conduct of the case requiring the exercise of this Court's supervision.	16
III. The District Court's order of August 9th, 1957 violates Rule 52 (a)	17
IV. The Appeals Court erroneously concluded no hearing on plaintiff's motion in the Trial Court was required and that a federal Court could not issue a mandatory preliminary injunction in this case.	19
Conclusion	23
Opinion District Court	7a
Opinion Court of Appeals	1a
Statutory Provisions	8a

CITATIONS.

Brown v. Quinlan, 138 F. 2d 228 18

City Line Center v. Loews, 178 F. 2d 267 22

Clemons v. Board of Education of Hillsboro, 228 F. 2d 853, 857 21

Dearborn Nat. Gas Co. v. Cons. Pet. Co., 164 F. 2d 332, 333 18

Ford Motor Co. v. Cottingham, 228 F. 2d 911 22

Galpin v. Page (U.S. 1873) 18 Wall 350, 365, 21 Law Ed. 959 12

Hallman v. U.S., 182 F. 2nd 880, 885 15

Hamilton Watch Company v. Benrus, 206 F. 2nd 738, 740 21

Kelley v. Everglades Dr. Dt., 319 U.S. 415, 420 18

La Buy v. Howes Leather Company, Inc., et al., 352 U.S. 249, 226 F. 2nd, 703 15

Madison v. Graber, 158 F. 2d 137, 141 17

Mayo v. Lakeland Highlands, 309 U.S. 310 17

McNabb v. U.S., 318 U.S. 332 16

Mesarosh v. U.S., 352 U.S. 1, 14 16

Mytinger v. Numanich Lab. Co., 215 F. 2d, 382, 385 22

Roche v. Evaporated Milk Association, 319 U.S. 19, 25 15

Scholz v. Barbee, 344 Ill. App. 630, 638 20

Shannon v. Retail Clerks, 128 F. 2d 553, 555 18

Sims v. Greene, 161 F. 2d 87, 88, 89 22

South State Street Building Corp., 140 F. 2nd 363 19

Sterling v. Constantine, 287 U.S. 378, 403 21

The Plow City, 122 F. 2d 816, 819 15

Toledo, A.A. & N.M. Ry. Co. v. Pennsylvania Co., 54 F. 730, 741 20

Trautwein v. Moreno, 22 F. 2d 374 21

U.S. v. Causby et al., 66 Supreme Court 1062, 1069 17

STATUTES.

28 U.S.C. Sec. 1651 20

Rule 15 (a) Rules of Civil Procedure 15, 23

Rule 52 (a) 3, 17, 18, 23

Rule 62 (g) 20, 23

Rule 65 (b) 3, 15, 23

Rule 65 (d) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D., 1957.

No.

JOHN B. SCHLOSSER,

Petitioner,

vs.

COMMONWEALTH EDISON COMPANY, WILLIS GALE, JOHN W. EVERS, JR., SOLOMON A. SMITH and H. P. SEDWICK,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

John B. Schlosser prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit affirming the judgment of the U.S. District Court for the Northern District of Illinois, Eastern Division and refusing to issue a Writ of Mandamus or grant other relief he specifically sought in the said Court of Appeals.

OPINIONS BELOW.

The opinion of the District Court is set forth at p. 7a herein, at p. 116 of the original Record, and the opinion of the Court of Appeals is to be found in 250 F. 2d 478 and p. 1a herein.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 2, 1958 and on March 31, 1958, Mr. Justice Clark extended the time for filing of this petition until May 2, 1958. The jurisdiction of this Court is invoked under 28 U.S.C.—1254 (1).

STATUTES INVOLVED.

The issues here involved, the interpretation of 28 U.S.C. Sec. 1651 and also Rules 15 (a); 52 (a); 62 (g); and 65 (b) and also the discovery rules of the Rules of Civil Procedure.

QUESTIONS PRESENTED.

1. Whether petitioner was receiving a prompt and fair trial in the District Court?

2. Whether the Court of Appeals possesses authority and was under a duty to direct the District Court to conduct the proceedings in order to assure petitioner a fair and prompt trial?

3. Whether the Court of Appeals erred in failing to grant petitioner any of the relief prayed for in his motion for Hearing, Interlocutory Injunction, and Writ of Mandamus or in holding such an injunction could not properly issue?

4. Whether Rule 52 (a) required the District Court to make specific findings of fact and conclusions of law in its memorandum of August 9, 1957 rejecting plaintiff's motion for a preliminary injunction?

5. Whether the District Court disregarded Rule 65 for the following reasons:

   a. Whether it was under a duty to set his motion for hearing?
   b. Whether it requires that petitioner be given an opportunity to present oral testimony or to argue the merits of his motion?

6. Whether such decisions conflict with applicable decisions of this Court?

7. Whether this Court should exercise its power of supervision?

STATEMENT.

This is a petition for a writ of Certiorari seeking review of the final judgment of the Court of Appeals of January 2, 1958, (1) affirming an order of the District Court denying plaintiff's motion for an interlocutory injunction without a hearing; (2) refusing to grant petitioner any relief pursuant to a Motion for Hearing, Interlocutory Injunction or Writ of Mandamus filed in the Court of Appeals on October 14, 1957, or its Supplementary Motion on December 10, 1957 asking that it direct the District Court to assure plaintiff a fair and prompt trial or to grant him other relief prayed for in such motion.

On April 30, 1957, petitioner, a resident of the State of California, filed his Complaint seeking to compel defendants to pay him a service annuity under the terms of the Commonwealth Edison Company Annuity Plan (hereinafter referred to as Edison). Petitioner had been employed by Edison for a total of 29 years and for the eight years prior to termination of his employment, he alleged he had suffered varying degrees of coronary and angina heart disease. Petitioner was compelled to resign on or about September 1, 1954 under threat of discharge if he did not resume his duties.

Petitioner's action was instituted as a beneficiary of Edison's annuity trust. This annuity was, of course, his deferred wages.

The principal aspects of the Edison Plan are (R. 12, 13):

(a) Payment of a Service Annuity to all employees attaining the age of 65 (Sec. 4, 1st par.).

(b) Payment of annuities to employees reaching the age of 60 under certain conditions (Sec. 4, 2nd par.).

(c) Payment of annuities on account of permanent disability and for any other reason in the third paragraph of Section 4, which provides as follows:

> "Any employee who shall not have attained the age of 65 while in service may, in the discretion of the Board and upon recommendation of the Committee, be retired, on account of permanent disability or for any other reason and without regard to age or period of credited service, with a service annuity in an annual amount computed in accordance with the provisions of Section 5 (b)."

(d) Payment of service annuities by trustees of Annuity Fund only upon certification by majority of Service Annuity Committee. (Sec. 1, Trust Agreement).

(e) Administration of the Service Annuity System by Service Annuity Committee (hereinafter referred to as Committee) and the Edison Board of Directors who also select the members of such Committee.

Petitioner, whose loyal and efficient service was conceded, was promoted to be an equipment expediter in 1951 and was engaged in such duties in 1954 when advised by his doctor that continuation in his work might unduly endanger his health.

Petitioner then requested that he be allowed to retire with an annuity under the said Plan (Section 4, par. 3). Such annuity, if any, was payable only during the remaining lifetime of an employee. Though entitled to a determination under the plan as to his right to a service annuity by the Edison Service Annuity Committee, he was denied a hearing by the Committee, the Committee never acted on his request and Edison rejected his request for an annuity.

Petitioner claimed the annuity plan is part of a comprehensive trust agreement and plaintiff was a beneficiary of such agreements. (Par. 9, Complaint) (R. 12) Plaintiff, by his complaint as amended, also sought (by Count II) the construction of various provisions in the plan which are vague or indefinite and fail to provide proper and reasonable standards for the determination of his legal rights (R. 19). Plaintiff seeks such construction of the above paragraph of Section 4 as well as Section 8 which provides that a service annuity shall cease upon bankruptcy, upon the entry of a judgment, and in case of any misconduct on the part of an annuitant and Section 9 insofar as it authorizes the secretary of the committee to require satisfactory evidence that each annuitant is still entitled to a service annuity, such provisions are claimed to be arbitrary, illegal and void.

Edison claimed it was justified in refusing to grant him a service annuity under the following rule:

> *"In 1954 or at present a person is entitled to disability retirement only by virtue of competent doctors stating that an employee is unable to perform any services."*
>
> (Letter of C. E. Parker, Manager of Industrial Relations, Commonwealth Edison Co. to plaintiff October 3, 1956. (Italics added) (Par. 16, Complaint) (R. 14)

However, petitioner was given notice of this rule for the first time two years after his retirement.

Petitioner filed a motion for a preliminary injunction on May 24, 1957. (R. 7-9) Petitioner's motion incorporated as part thereof his original complaint as amended.

The District Judge (Win J. Knoch) on March 24, 1957 took under advisement plaintiff's motion that his motion for preliminary injunction be set for hearing. More than

2 months later without according the plaintiff a hearing, the Court on July 30, 1957, denied the motion on the merits at the very time plaintiff was in court seeking a hearing on his motion. This ruling was confirmed on August 9, 1957 by the Court's memorandum order.

Petitioner was also denied an opportunity to argue the merits of his motion and only after the Court announced its decision on the merits, did the court allow him an opportunity to file a memorandum as to his right to present oral testimony.

On May 24, 1957, plaintiff requested that his motion be set for hearing and the following took place in Court: (R. 35)

> "The Court: We will hear this matter on briefs, if you will both get in your briefs—
>
> Mr. Booth: No. I am entitled to a trial, if the Court please, under the decision of the Federal Courts, and I want this motion for a preliminary injunction set down for hearing. I am entitled to a hearing and a trial in Court.
>
> The Court: I am going to give you twenty days, and when your pleadings are filed, I will consider the matter of a date for hearing.
>
> Mr. Booth: We can't get a date today, if the Court please?
>
> The Court: I can't give you a date today, no."

On the same date the Court entered the following order: (R. 21)

> "This day come the parties by their attorneys and the plaintiff presents his motion for preliminary injunction which motion is entered and it is
>
> Ordered that the defendant be and is hereby given 20 days to answer said motion and it is
>
> Further Ordered that the plaintiff's motion to set this cause for hearing on his motion for preliminary injunction be entered and said motion is taken under advisement by the Court."

On June 10, 1957 the following took place in open Court. (R. 73, 74)

> Mr. Ming: (attorney for defendants): It then will be unnecessary to set the motion for temporary injunction. Instead the Court will have before it our motion to strike the petition for temporary injunction, raising the issue."
>
> Mr. Booth: Well the problem is that the defendants have been given a very long time * * * to file a pleading to a motion for a temporary injunction. The question still is as to whether or not the Court will grant the Plaintiff a hearing on a motion for a temporary and preliminary injunction as prayed for in his motion."

On the same day the Court entered the following order in part:

> "Further Ordered that leave be and it hereby is given to the defendants to file by June 17, 1957 their motion to strike plaintiff's petition for a preliminary injunction and said motion is hereby taken under advisement by the Court on the briefs of counsel, supporting brief to be filed within 5 days from this date and answering brief within 5 days thereafter." (R. 42)

Respondents, though they represented to the District Court that it was their intention to file a motion to strike, filed no such motion, but on the contrary on June 17, 1957 filed a 2-page answer to plaintiff's motion for preliminary injunction.

On July 30, 1957 plaintiff's motion for a hearing on his motion for preliminary injunction again came before the District Court. The transcript discloses that the trial Court then denied the motion for preliminary injunction on its merits even though the Court had, over sixty days earlier, advised the parties in open court that it would take under advisement plaintiff's motion for a hearing on such motion. No ruling up to that time had taken place and no opportunity to argue the motion or any other hearing

had then been allowed other than for formal presentation of the motions at issue.

The transcript of proceedings of such date shows the following: (R. 99, 100, 101)

> "Mr. Booth: • • • The question there is, is the court going to allow the plaintiff a hearing on his motion for temporary injunction and will the Court now fix a date for it? That is the first one.
>
> I have, since May 24th, repeatedly asked the Court to fix a time for a hearing on it, and if the Court would fix a date some afternoon next week, or earlier, it would be satisfactory to me, but I am not asking that it be heard at this moment because I want a few days notice. That is the first matter." • • •
>
> Mr. Booth: Well, the question is, we are as a matter of law clearly entitled to a hearing on our motion for temporary injunction. The defendants said they would file a motion to strike. The Court on June 10, 1957—I have the Court order here—gave them permission to file a motion to strike. They decided not to, and they filed an answer, and the Court in that order of June 10th said that it would take motion under advisement if the defendants filed a motion to strike and briefs were filed, so I ask that the Court, at its earliest convenience, no later than some day next week, fix a date for hearing on that motion.
>
> The Court: Well, *I have gone into this matter, gentlemen, and I have decided that the motion for preliminary injunction should be denied.*" (italics added) (R. 101)

After petitioner perfected his appeal in the Court of Appeals he on October 14, 1957 filed a Motion for Hearing, Preliminary Injunction or in the alternative for a Writ of Mandamus and a typewritten brief in support of such motion which also argued the merits of the appeal. The defendants filed a printed brief in brief in opposition thereto and plaintiff filed reply brief.

The Court then set the motion for oral argument, but the parties agreed the argument would cover both the Motion and the merits of the Appeal. The Court is partly in error when it said "no appendix or brief was filed." True, no appendix was filed but typewritten briefs were filed covering all issues upon which petitioner now contends the Court of Appeals and the District Court committed error. In fact, the Court subsequently states on the same page "after submission of briefs" but implies they related only to the Motion which is incorrect. The defendants' brief likewise requested the Court of Appeals "to dispose of both plaintiff's motion and appeal." (p. 9)

REASONS FOR ALLOWANCE OF WRIT.

I.

Petitioner's inability to secure a fair and prompt trial in the Trial Court required the Court of Appeals to take corrective action by mandamus.

Petitioner was denied a fair trial in the District Court below, and the facts were clear to the Court of Appeals. It was the duty of the Court, in the interest of prompt and efficient administration of justice, to open—not close—its eyes to the right of plaintiff to secure a fair and prompt trial.

This is what the Appeals Court did when it said "We see no reason to discuss other points argued by plaintiff. Even so, we perhaps should mention plaintiff's criticism of Judge Knoch. We think it is without merit."

The facts as set forth in the motion seeking a writ of mandamus and other relief filed with the Court of Appeals on October 14, 1957 and the motion submitted to it on December 4, 1957 follow:

1. The District Judge (Win J. Knoch) took under advisement for a period of over two months, plaintiff's motion that his motion for temporary injunction be set for hearing and without according plaintiff a hearing on July 30, 1957, denied the motion on the merits at the very time plaintiff was in court praying for a hearing on his motion. This ruling was confirmed on August 9, 1957, in open court.

2. Petitioner was denied an opportunity to argue the merits of his motion and only after the court announced its decision on the merits (R. 101), did the court allow him an opportunity to file a memorandum as to his right to present oral testimony.

In *Wilson* v. *Federal Communications Commission*, 170 F. 2nd, 793, 802 the Court said:

> "An essential element of due process is an opportunity to be heard before the reaching of a judgment. By due process of law is meant 'a law, which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial * * * ' and as said in *Galpin* v. *Page* (U.S. 1873) 18 Wall 350, 365, 21 Law Ed. 959 'Judgment without such citation and opportunity wants all the attributes of a judicial determination. It is judicial usurpation and oppression and can never be upheld where justice is justly administered.'"

The District Court failed to comply with this principle.

3. Petitioner filed amendments to his Amended Complaint on July 24, 1957 though they were the first amendments of substance to Count I and the first amendments of Count II. (1) The defendants objected to these amendments and the Court held up action upon them for over 4 months.

4. Petitioner, on July 16, 1957, filed his first set of interrogatories consisting of 38 questions and various subquestions. (R. 84ff) The defendants objected to each and every interrogatory (R. 93) and the District Court, as of the time of argument (December 4, 1957) had not yet ruled on these objections.

5. Petitioner since June 10, 1957, has been denied all forms of discovery including subpoena or other access to Edison records disclosing the meaning or application of

---

(1) It was only when defendants withdrew their objections on December 11, 1957 that the Court allowed them to stand. See certified copy of docket entries in District Court filed with Motion for Extension of Time to File Petition for Certiorari.

the term, "*permanent disability or for any other reason,*" contained in the third paragraph of Section 4 upon which petitioner claims an annuity.

6. The defendants, on September 13, 1957, filed a motion for summary judgment consisting of documentary material in excess of 100 pages, much of which was not under oath. Said documents disclosed that the defendants' medical determination that the plaintiff did not come within the said Section 4 was based upon information supplied by Edison employees that plaintiff had a desk job, but other Edison employees in the same pleading stated, under oath, that his duties consisted of that of an equipment expediter involving trips to various plants in connection with the delivery of millions of dollars of equipment.

7. Plaintiff, on September 10, 1957, filed notice to take the depositions of one of the defendant's doctors and two directors. (R. 119) The District Court, on September 13, 1957, (R. 121) upon defendants' request immediately stayed all discovery of each and other kind pending ruling on plaintiff's request that he be allowed such discovery in order that he might be able to secure relevant facts in the possession of defendants, their employees or their reports upon which he could file counter affidavits to defendants' motion for summary judgment. (*)

(*) On March 7, 1958, the Executive Committee of the District Court assigned this cause to Honorable Julius Miner who then was sworn in as a member of the District Court. On March 27, 1958, during the preliminary call of some of the numerous cases transferred to him, he did set for hearing on June 9, 1958, the various pending motions relating to discovery, etc., and which had not been disposed of by Judge Knoch, and stated that he was unable to grant petitioner's request that such matters be considered on an earlier date.

The relief sought in the Court of Appeals was of course not limited to a demand that the District judge be directed to return the case to the Executive Committee for reassignment. The supplementary motion submitted on December 4, 1957 requested that the Court of Appeals direct that "all motions now pending in the District Court and upon which all parties have been heard be disposed of with dispatch." It also requested further action consistent with the proper administration of justice. The Court of Appeals was therefore under a duty to act in view of the fact that at the time of the oral argument it appeared beyond dispute that plaintiff had not been allowed to amend his pleadings or that any order had been entered within 4½ months of filing, that no action had been taken on plaintiff's first interrogatories though filed on July 16th or 4½ months earlier, that other discovery demands likewise had not been acted upon by the District Court for several months and that all discovery had been stayed on September 13th pending action on plaintiff's request that he be allowed discovery in order to meet defendants' 100 page motion for a summary judgment.

The Court of Appeals not only failed to take note of this situation, but also said there was no basis for plaintiff's criticism of the District Judge, though he was clearly entitled to prompt action by the District Judge on all pending matters. It was the opinion of the Court of Appeals that contributed to the present situation which leaves unacted upon discovery demands for a period of 7 to 9 months. (1) The proper function of the Court of Appeals where the District Court permits undue delay

(1) See certified copy of docket entries in District Court filed with Motion for Extension of Time to File Petition for Certiorari.

was set forth in *The Plow City*, 122 F. 2d 816, 819 (C.A. 3rd) where the Court said:

> "The responsibility for the delays, and postponements must therefore rest with the trial judge. To conduct in this desultory manner over a period of nine months a trial which ought not to have consumed ten days is an abuse of judicial discretion on the part of the trial court, which this court cannot overlook."

In *Hallman* v. *U.S.*, 182, F. 2nd 880, 885, the court said:

> "A trial court has the duty of safeguarding the rights of all parties before it."

It should have been clear to the Court of Appeals that the trial court was not conducting this proceeding consistent with its high duty and it was the Court of Appeals' responsibility to take appropriate action to assure plaintiff a fair and prompt trial.

Since the Court of Appeals had jurisdiction on appeal, it had jurisdiction to issue a writ of mandamus. *Roche* v. *Evaporated Milk Association*, 319 U.S. 19, 25. That very Court as has this Court affirmed the power to issue writs of mandamus even where a district court abuses its discretionary power under the federal rules. *La Buy* v. *Howes Leather Company, Inc., et al.*, 352 U.S. 249, 226 F. 2nd, 703.

There the Court of Appeals held that (p. 706) the question is are the orders "beyond the Court's power under the pertinent rule" and whether they conform to the Rule. The trial Court was surely shown to have abused its power in failing to grant a hearing under rule 65 (b) in that it allowed no hearing whatsoever on the motion for preliminary injunction including an opportunity to argue the merits of the motion, not to say the right to present oral testimony. It likewise failed to conform to Rule 15 (a) which provides that leave to amend shall be freely given,

though the motion to amend had been before him approximately 4½ months.

It also failed to conform to the spirit of the discovery rules when it failed to act on interrogatories and stayed the deposition request for a period of several months. The purpose of the rules was to aid parties in more expeditiously securing a trial, not to enable one party or a court to unnecessarily delay a case and deprive American citizens of their fundamental procedural rights

II.

The Court of Appeals sanctioned a departure by the lower courts of the proper and usual course of the conduct of the case requiring the exercise of this court's supervision.

This Court in *Mesarosh* v. *U. S.*, 352 U.S. 1, 14 has reaffirmed its supervisory functions to assure the proper administration of justice in the federal courts. It has declared

> "the untainted administration of justice is certainly one of the most cherished aspects of our institution. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. See *McNabb* v. *U.S.*, 318, U.S. 332. Therefore fastidious regard for the honor of the administration of justice requires the court to make certain that the doing of justice be made so manifest that the only irrational or perverse claims of its disregard can be asserted."

This principle is of course equally applicable to civil as well as criminal suits. In the field of civil proceedings it is the distinct function of district courts to demonstrate that between employees of large utility corporations and the corporation itself there is an even handed and firm administration of the trial so as to leave no doubt

but both are accorded the same standards of justice. Here however, the refusal of the court to act upon the various motions for discovery made by the plaintiff or to give him a fair and prompt hearing served only to oppress and discriminate against the plaintiff to the unfair advantage of respondents.

It was the dilatory tactics of the defendants approved by the District Court that paved the way for the present condition where the District Court has not for a period of many months acted upon simple discovery matters which should have been disposed of within a period of two to three weeks. The Court of Appeals failed to perform its duty by condoning the conduct of the trial Court.

III.

The District Court's order of August 9th, 1957 violates Rule 52 (a).

The Trial Court's single page memorandum of August 9th denying plaintiff's motion for preliminary injunction (R. 116) contains no findings of fact unless its final conclusion denying any kind of a hearing is to be taken as one. Thus, notwithstanding the plain and simple mandate of Rule 52 (a) imposing this duty upon him, he failed to comply with it as he did with other controlling principles. This Court has held that it is of the highest importance to a proper review of the action of a District Court in granting or refusing a preliminary injunction that such findings be made. *Mayo* v. *Lakeland Highlands*, 309 U.S. 310. This is the rule in all federal courts including the 7th Circuit, but not applied in this case.

The memorandum filed by the Court is clearly not that kind of an opinion within Rule 52 (a). This very Appeals Court in *Bank of Madison* v. *Graber*, 158 F. 2d 137, 141, citing with approval *U. S.* v. *Causby et al.*, 66 Supreme

Court 1062, 1069 held that findings must be made on every material issue in granting or denying a motion for a preliminary injunction.

Petitioner did argue this issue in the Court of Appeals. The brief he filed expressly relies upon the above cases. The Court of Appeals apparently ignored this issue even though its earlier rulings disclose a positive adherence to the rule. In *Shannon* v. *Retail Clerks*, 128 F. 2d 553, 555 the Court in referring to Rule 52 (a) and 65 (d) said:

> "These are strongly worded mandatory provisions which should be respected. They are not meaningless words • • • if, however, it is assailed on appeal [the absence of findings] it should be set aside because a failure to respect and comply with the rules."

And in *Brown* v. *Quinlan*, 138 F. 2d 228 this same court held that findings are necessary in denying as well as granting a motion for preliminary injunction. The Court also held that ultimate findings without subordinate findings do not constitute compliance with the rule. See also *Dearborn Nat. Gas Co.* v. *Cons. Pet. Co.*, 164 F. 2d 332, 333 relying on *Kelley* v. *Everglades Dr. Dt.*, 319 U.S. 415, 420.

It is apparent from the order of the Court that it lacks even any semblance of compliance with the rule. The Court said "Scrutiny of all the pleadings, in the light of the arguments, fails to disclose allegations which, although viewed in the light most favorable to plaintiff, are sufficient to warrant issuance of a preliminary injunction." However, it failed to state what the pleadings were, what allegations were contained in the pleadings or why they were insufficient. In fact, only the conclusion appears with no findings supporting it whatsoever.

IV.

The Appeals Court erroneously concluded no hearing on plaintiff's motion in the Trial Court was required and that the federal courts could not issue a mandatory preliminary injunction.

The Court of Appeals excused the District Court from holding a hearing of any kind and from making findings in its order by relying upon the proposition of *South State Street Building Corp.*, 140 F. 2nd 363, where the Court held:

> "the denial of a temporary injunction, based on a verified complaint alone was certainly no abuse of discretion, where the complaint did not state a cause of action or any facts showing irreparable injury."

The Appeals Court said no irreparable damages could be established because the payment of the pension before trial on the merits would not maintain the status quo but produce the opposite result. It is the very nature of plaintiff's contract with defendants and their actions preventing him from securing a prompt and fair trial which adds to the grave irreparable injury requiring prompt judicial action. The defendants can, of course, be fully protected by a bond.

The defendants by their own conduct destroyed his ability to obtain an effective remedy at law. In the trial court they utilized every technical device known to them to prevent petitioner from securing a fair or prompt hearing. Perhaps they believed their financial and other resources, in which they were heavily superior, could force petitioner to drop his efforts to secure a pension. Their policy deprived him of a hearing before Edison's Annuity Committee. Two years after he retired he first learned of the principle governing the granting of annuities under Sec. 4, par. 3. No published records or reports ever set forth this principle.

It is his contract which establishes his right to an annuity regardless of age or duration of employment under the third paragraph of Section 4 which provides for retirement "on account of permanent disability or for any other reason". It is the condition of the status quo which produces the irreparable injury for his annuity is to be payable during his lifetime. Time is of the essence in this case. Under these circumstances, the Courts may grant preliminary mandatory injunctions.

Former President Taft, while a Circuit Judge, recognized this principle when he said:

> "The office of a preliminary injunction is to preserve the status quo until, upon final hearing, the court may grant full relief. Generally this can be accomplished by an injunction prohibitory in form, but it sometimes happens that the status quo is a condition not of rest, but of action, and the condition of rest is exactly what will inflict the irreparable injury upon complainant, which he appeals to a court of equity to protect him from. In such a case, courts of equity issue mandatory writs before the case is heard on its merits." *Toledo, A.A. & N.M. Ry. Co.* v. *Pennsylvania Co.*, (CC ND Ohio 1893) 54 F. 730, 741, 19 LRA 387. This principle was approved in *Scholz* v. *Barbee*, 344 Ill. App. 630, 638.

The Court of Appeals erroneously assumed that federal law does not permit the granting of mandatory preliminary injunctive relief. Plaintiff's motion for interlocutory relief in that Court was predicated on both 28 U.S.C., Sec. 1651 and Rule 62 (g) of the Rules of Civil Procedure. The rule does not limit the power of the appellate courts to grant any type of injunctive writ for it says that such courts have power "to grant any injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo".

Moreover, petitioner brought this suit as a beneficiary of an annuity plan which was part of a comprehensive trust agreement in which he was seeking not merely the recovery of his own annuity but the construction of indefinite, vague and arbitrary provisions of the annuity plan, one of which was the 3rd paragraph of Section 4. Mandatory preliminary injunctions are issuable where as here a complainant alleges that the acts of the defendants were wilful or fraudulent. *Trautwein* v. *Moreno*, 22 F. 2d 374. A Court of Appeals recently reversed a trial court for failure to issue a mandatory preliminary injunction where the denial of the writ meant the continuation of the deprivation of basic human rights. *Clemons* v. *Board of Education of Hillsboro*, 228 F. 2d 853, 857. That court relied upon Pomeroy: Equity Jurisprudence, Vol. 4, 5th Ed., 934, 935, where the author said:

> "The incompleteness and inadequacy of the legal remedy is the criterion which, under the settled doctrine, determines the right to the equitable remedy of injunction."

The court also said:

> "The same test was established by the Supreme Court in *Sterling* v. *Constantine*, 287 U.S. 378, 403, 53 S. Ct. 190, 197, 77 L. Ed. 375, wherein the Supreme Court said:
>
> > 'Whether or not the injured party is entitled to an injunction will depend upon equitable principles; upon the nature of the right invaded and the adequacy of the remedy at law.'

The Appeals Court also overlooked the prevailing rule of the federal courts that it is not necessary that plaintiff's right to a final decision be absolutely certain and that very court approved the following principle laid down by the Second Circuit in *Hamilton Watch Company* v. *Benrus*, 206 F. 2nd 738, 740, where that court said:

> "It is not necessary that the plaintiff's right to a final decision, after a trial be absolutely certain, wholly without doubt; if other elements are present, (i.e. the balance of hardships tips decidedly towards plaintiff). It will ordinarily be enough that the plaintiff has raised serious questions going to the merits, so serious, substantially difficult and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation." Approved in *Mutinger* v. *Numanich Lab. Co.*, 215 F. 2d 382, 385.

Surely in this case the denial of a mandatory preliminary injunction works enormously against the plaintiff. The defendants can be protected by a bond. And it is their acts which have created the condition of irreparable injury the continuation of which is assured by their conduct and the denial of the relief sought by petitioner. The annuity represents the balance of his compensation held back by the defendants until retirement, is payable, if at all, during his remaining lifetime, not afterwards.

In the following three cases Courts of Appeals have set aside a district court order for failure to allow parties to present oral testimony on a motion for a preliminary injunction:

> *Sims* v. *Greene*, 161 F. 2d 87, 88, 89;
> *City Line Center* v. *Loews*, 178 F. 2d 267;
> *Ford Motor Co.* v. *Cottingham*, 228 F. 2d 911.

In the *City Line* case the Court said, reversing a District Court order which failed to provide for a hearing:

> "At the hearing the District Judge determined no testimony should be offered and denied the Motion * * * It is obvious appellants were not allowed the hearing contemplated by Rule 65 (a) of the Federal Rules of Civil Procedure, 28 U.S.C.A., *Sims* v. *Greene*, 161 F. 2d 87."

Upon the basis of the above authority it is clear that the District Court abused its discretion in not granting a hearing to the plaintiff on his motion for a preliminary injunction and that its denial constitutes a violation of his rights under the Federal Rules.

CONCLUSION.

Petitioner has shown that the trial Court and the Court of Appeals have departed from important principles of trial procedure long approved by this Court and other federal courts. He has been deprived of a fair and prompt trial because of the failure to properly apply the discovery rules, Rules 15 (a), 65 and 62 (g). Rule 52 (a) was also ignored. This is indeed an appropriate case for the exercise of this Court's supervisory powers over subordinate federal courts.

Respectfully submitted,

Harry R. Booth

HARRY R. BOOTH,

Attorney for Petitioner,
John B. Schlosser.

APPENDIX A.

In The

UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 12145 SEPTEMBER TERM AND SESSION, 1957

JOHN B. SCHLOSSER,

Plaintiff-Appellant,

vs.

COMMONWEALTH EDISON COMPANY ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 2, 1958

Before DUFFY, *Chief Judge*, MAJOR and HASTINGS, *Circuit Judges*.

MAJOR, *Circuit Judge*. Plaintiff, a retired employee of defendant (defendant refers to the corporate defendant), commenced an action in the District Court for the recovery of money alleged to be due and owing under a service annuity plan in effect at and prior to the time of his retirement. It was alleged that plaintiff under said plan was entitled to monthly service annuity payments in the amount of $137.77, from the date of his retirement and during the remainder of his life. Later, plaintiff filed an additional count purporting to be a class action which

sought an interpretation, modification and alteration of defendant's service annuity plan. Plaintiff demanded a trial by jury. Defendant answered the complaint and, among other things, requested its dismissal for failure to state a claim upon which relief could be granted. This action is at present pending in the District Court.

On May 20, 1957, after proper notice to defendant, plaintiff filed in the District Court his motion for a preliminary injunction. Attached thereto and made a part thereof were copies of the complaint and defendant's service annuity plan. The motion includes the allegation:

> "Plaintiff has instituted this proceeding for the purpose of compelling the defendants to pay him such additional compensation or Service Annuity as required by the third paragraph of Section 4 of said Service Annuity System which annuity the defendants have arbitrarily and unlawfully denied him."

The motion concludes:

> "Plaintiff has suffered and will continue to suffer great and irreparable damage unless this Court forthwith enters an interlocutory decree or decrees requiring the defendant to promptly pay him a Service Annuity of not less than $137.77 per month as prayed for in said Complaint.
>
> "Now, Therefore, plaintiff prays that this Court grant him an immediate hearing and enter a decree or decrees as prayed for herein."

Defendant filed its answer, in which it alleged, among other things, "The plaintiff does not set forth sufficient grounds to warrant issuance of a preliminary injunction." On August 9, 1957, Judge Win G. Knoch of the District Court entered a "Memorandum and Order" as follows:

> "This matter came on to be heard on plaintiff's motion for oral hearing and the taking of testimony in support of his motion for preliminary injunction.
>
> "The Court has had the benefit of argument of counsel on briefs, and is fully advised in the premises.

"Scrutiny of all the pleadings, in the light of the arguments, fails to disclose allegations which, although viewed in the light most favorable to plaintiff, are sufficient to warrant issuance of a preliminary injunction.

"It appears unnecessary to set this matter for oral hearing and the introduction of testimony in support of the allegations which, if proved, set out no claim on which the relief sought could be granted.

"It is the order of this Court that motion for oral hearing be, and it is hereby, denied.

"It is further ordered that motion for preliminary injunction be, and it is hereby, denied."

From this order of August 9, plaintiff appealed to this Court, with particular emphasis on that part of the order which denied plaintiff the right to offer testimony in support of his motion. In connection with his appeal, plaintiff has filed in this Court a record of the proceedings in the District Court. No appendix or brief has been filed in support of the appeal.

Plaintiff, on October 14, 1957, filed in this Court in connection with his appeal a motion entitled "Motion for hearing and for preliminary injunction or for a writ of mandamus and for other relief." The motion purports to be filed under Title 28 U.S.C.A. Sec. 1651, and Rule 62 (g) of the Federal Rules of Civil Procedure. The motion, so it states, is based upon three propositions, (1) the action of the District Court in denying without a hearing plaintiff's motion for a preliminary injunction; (2) the inability of plaintiff to secure a fair and full hearing before Judge Knoch, and (3) plaintiff's ability to demonstrate upon a hearing that he is suffering gross and irreparable injury, that defendant will suffer no injury and that plaintiff in all likelihood will be entitled to a judgment in his favor upon final hearing. The relief sought is (1) that the motion be set for argument, (2) that a date be set for hearing of oral testimony upon the motion for preliminary

injunction, and (3) that an order be entered directing Judge Knoch to expunge his order of August 9, 1957, and to transfer the cause for reassignment to the Executive Committee of the District Court for hearing on plaintiff's motion for a preliminary injunction. After submission of briefs by the respective parties, the instant motion was set for hearing and argued orally before this Court. In the view we hold, we need not be concerned with our authority to grant the relief sought. This is so for the reason that the heart of the controversy engendered by the instant motion relates to the order of the District Court entered August 9, 1957, denying plaintiff's motion for a preliminary injunction, which is also the same order from which plaintiff has appealed. If that order was properly entered, all other issues fall by the wayside.

Plaintiff's main grievance appears to be that the District Court erred in its refusal to hear testimony in support of his motion and in its failure to make findings of fact in conformity with Rule 52 (a) of the Federal Rules of Civil Procedure. No cases need be cited for the proposition that ordinarily parties are entitled, on a motion for preliminary injunction, to offer testimony in support of their respective positions. This ordinary rule, however, is without application here because the Court (see its memorandum above quoted) concluded as a matter of law that plaintiff's allegations, even if proven, were insufficient to warrant the issuance of an injunction. With this conclusion we agree. The hearing of testimony in support of an insufficient allegation would be no more than an idle and useless ceremony. There is no rule and no case, so far as we are aware, which requires the hearing of testimony under such circumstances. While plaintiff alleges that failure to issue a preliminary injunction will result in irreparable damages to him, his motion and complaint

demonstrate to the contrary. It is indeed a novel theory that in an action for the recovery of damages the right to which is controverted by defendant, a preliminary injunction should issue to require a defendant to make payments in advance of a determination of the case on its merits. Plaintiff attempts to escape this dilemma by arguing that defendant's service annuity plan contemplates payments to a retired employee during his lifetime, and that a failure to so pay constitutes irreparable damages because the former employee might die before his rights were determined on the merits. The argument, if accepted, could be utilized in every action brought for the recovery of damages or a money award. We think it is without merit. Moreover, there is no showing that a preliminary injunction was necessary to preserve the status quo; in fact, its issuance would produce the opposite result.

This Court, in *In re South State Street Bldg. Corporation*, 140 F. 2d 363, sustained the action of the District Court in denying a request for a temporary injunction and in doing so made the following pertinent statement (page 366):

> "• • • For aught that appears in the complaint, the relief that the appellant sought and claimed to be entitled to could have been granted on final hearings, without irreparable damage to her. The failure to allege facts constituting irreparable injury was of itself justification for denying the temporary injunction. [Citing cases.]
>
> "• • • The denial of a motion for a temporary injunction, based upon a verified complaint alone, was certainly no abuse of discretion, where the complaint did not state a cause of action or any facts showing irreparable injury. [Citing cases.]"

Concluding as we do that the order of August 9, 1957, denying plaintiff's motion for preliminary injunction, was proper and that the Court did not err in refusing to hear

testimony in its support, we see no reason to discuss other points argued by plaintiff. Even so, we perhaps should mention plaintiff's criticism directed at Judge Knoch. We think it is without merit. We are not aware of any authority possessed by this Court on the record before us to direct that the cause be transferred to the Executive Committee of the District Court for reassignment. Furthermore, if we had the authority, we would not do so under the circumstances shown.

The relief sought by the instant motion is denied. In view of what we have held, there appears to be no other question for decision in plaintiff's appeal from the order of August 9, 1957, denying plaintiff's motion for preliminary injunction. The order appealed from is, therefore, affirmed. Costs in connection with both the appeal and the instant motion will be taxed against plaintiff.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT

For The Northern District of Illinois
Eastern Division

JOHN B. SCHLOSSER,

Plaintiff,

vs.

COMMONWEALTH EDISON COMPANY, ET AL.,

Defendants.

No. 57 C 785

MEMORANDUM AND ORDER.

This matter came on to be heard on plaintiff's motion for oral hearing and the taking of testimony in support of his motion for preliminary injunction.

The Court has had the benefit of argument of counsel on briefs, and is fully advised in the premises.

Scrutiny of all the pleadings, in the light of the arguments, fails to disclose allegations which, although viewed in the light most favorable to plaintiff, are sufficient to warrant issuance of a preliminary injunction.

It appears unnecessary to set this matter for oral hearing and the introduction of testimony in support of allegations which, if proved, set out no claim on which the relief sought could be granted.

It is the order of this Court that motion for oral hearing be, and it is hereby, denied.

It is further ordered that motion for preliminary injunction be, and it is hereby, denied.

Win G. Knoch
United States District Judge

Date: August 9, 1957

APPENDIX C.

Rule 15 (a), Rules of Civil Procedure for the United States District Courts, is as follows:

> (a) AMENDMENTS. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Rule 52 (a), Rules of Civil Procedure for the United States District Courts, is as follows:

> (a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. * * *

Rule 62 (g), Rules of Civil Procedure for the United States District Courts, is as follows:

> (g) Power of Appellate Court Not Limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.